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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 394

MENDOCINO WOOD PRODUCTS, INC.,
Petitioner,

vs.

ALBERT MILLER, ROBERT B. RIDDLE, and ARTHUR O. WOODALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California
First Appellate District, Division Two

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1. Certified copy of the clerk's transcript and the reporter's transcript of the Superior Court trial, filed in the office of the Clerk of the District Court of Appeal of the State of California, First Appellate District.
2. Certified copy of the opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two.
3. Certified copy of petition for rehearing filed in the District Court of Appeal, First Appellate District, Division Two, and certified copy of the order denying said petition.
4. Certified copy of petition for hearing filed in the Supreme Court of the State of California, and certified copy of order denying said petition.
5. All of the original exhibits in evidence at the trial in the Superior Court, certified by the Clerk of said Court, and consisting of plaintiff's exhibits: 1, 2, 3, 4, 5, 6, and 7; and of defendants' exhibits A, B, C, D, E, F, G, H, I, J, and K. These exhibits are itemized at page 3 of the Clerk's transcript on appeal.

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No.

MENDO WOOD PRODUCTS, INC.,
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ALBERT MULDER, ROBERT B. RIDDLE, and ARTHUR O. WOODALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the
State of California
First Appellate District, Division Two

Mendo Wood Products, Inc., a corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California in and for the First Appel-

late District, Division Two, numbered 1 Civil 21,307, filed and entered March 17, 1964, as to which judgment the Supreme Court of the State of California denied a hearing on May 17, 1964.

OPINIONS BELOW

The Memorandum Opinion of the Superior Court dated November 20, 1962 and filed November 23, 1962, is unreported and is printed in Appendix A hereto, *infra*, page 1. Findings of Fact and Conclusions of Law of the Superior Court, dated and filed December 21, 1962, are unreported and are printed in Appendix A hereto, *infra*, page 7. The judgment of the Superior Court dated and filed December 21, 1962 is unreported and is printed in Appendix A hereto, *infra*, page 11. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two, is printed in Appendix A hereto, *infra*, page 13. This opinion is not yet reported in permanent form in The California Reporter but is presently printed in Advance Sheet form in Volume 37 California Reporter, page 479. It has not yet been reported in permanent form in the California Appellate Reports, but is presently printed in Advance Sheet form in Volume 225 Advance California Appellate Reports, page 761. The order denying the petition for rehearing in the District Court of Appeal is presently unreported, but a copy thereof is printed in Appendix A hereto *infra*, page 34. The order of the Supreme Court of the State of California denying the petition for hearing is

presently unreported but a copy thereof is printed in Appendix A hereto, *infra*, page 35.

JURISDICTION

The judgment of the District Court of Appeal of the State of California, First Appellate District, Division Two, was entered on March 17, 1964. (*Infra*, Appendix A, page 13.) A timely petition for rehearing in said Court was denied on April 16, 1964. (*Infra*, Appendix A, page 34.) A timely petition for hearing by the Supreme Court of the State of California was denied on May 13, 1964. (*Infra*, Appendix A, page 35.) An order by the Superior Court of the State of California in and for the County of Mendocino staying execution on appeal from its judgment herein directing the payment of money, and based upon the deposit of $16,000, was filed in that Superior Court on the 16th day of June, 1964, granting a stay until the final determination is rendered by the Supreme Court of the United States upon this petition.

The jurisdiction of this Court is invoked under *American Railway Express Company v. Levee*, 263 U.S. 19; under *Atchison, Topeka & Santa Fe Railway Co. v. Robinson*, 233 U.S. 173, 181; *St. Louis, Iron Mountain and Southern Railway Company v. Starbird*, 243 U.S. 592, 594, 599, and *Illinois Steel Co. v. B. & O. Railroad Co.*, 320 U.S. 508, 511; and under Title 28, U.S.C., Judiciary and Judicial Procedure, Section 1257, subd. 3 (Appendix B, page 37.) Since the right and title of petitioner is specially set up and

claimed under the statutes, commission held, and authority exercised under the United States.

These authorities sustain the power and the jurisdiction of this Court to review the State Court judgment of which review is here sought.

QUESTIONS PRESENTED

1. When in an action in a State Court under the Fair Labor Standards Act and its companion acts, the Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, it is both proven and admitted that the employer operated as a private carrier, subject to the provisions of the Act, during the complete calendar years 1957-1958, and was then exempt from overtime compensation provisions, may the State Court in the absence of either proof or finding of any change in our termination of the exempt status of defendant employer as such operator under the Act, deprive it of the benefits thereof?

2. Where it is both proven and admitted in a State Court action under the Fair Labor Standards Act and its companion acts, the Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, that during the calendar years 1957-1958 the defendant employer was engaged in hauling its own products as a private carrier in interstate trucking commerce, and was during those years exempt from overtime compensation provisions, may the State Court use evidence purporting to establish non-interstate activity

in the calendar years 1959-1960, *sans* any action, proceeding, or notice, by or from any source, to support a judgment that such employer is no longer engaged in interstate commerce?

3. May a State Court, where the issue is whether defendant is subject to the payment of overtime compensation under the Fair Labor Standards Act, and its companion acts, the Motor Carrier Act of 1935; and the Portal to Portal Pay Act of 1947, and where such Court wholly fails and omits (actually *refuses*, C.T. pp. 42-45) to make findings of fact as to the number of actual hours worked and paid for, or that petitioner was not exempt from overtime compensation provisions, render judgment for overtime compensation (carrying heavy penalties imposed thereby and therefor) and thereby deprive defendant employer of his property and of the benefits of the Federal statutes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved here are Section 8, Clause 3, and Amendment XIV, Section 1. The statutes involved here are Title 28 U.S.C., Judiciary and Judicial Procedure, Section 1257, subd. 3; Fair Labor Standards Act, Title 29 U.S.C., Labor, Chapter 8, Sections 207, 213, 216; The Motor Carrier Act of 1935, Title 49, U.S.C., Transportation, Interstate Commerce Act, Part II, Sections 303, 304; Portal to Portal Pay Act of 1947, Title 29, U.S.C.,

Labor, Chapter 9, Sections 255 and 260; Code of Federal Regulations, Title 29, Labor, Appendix, Chapter 5.

The pertinent provisions of these several sections of the Constitution of the United States and of these several statutes are printed in Appendix B, infra. A detailed pagination index precedes that portion of this petition which is devoted to appendices, and will also be found in the index at the front of this printed petition.

STATEMENT OF THE CASE

Note: petitioner deprecates the length of this statement, but under the questions here presented, deems it impracticable to attempt further condensation.

The three named respondents, Mulder, Riddle and Woodall were employed as truck drivers by petitioner herein, Mendo Wood Products, Inc., a lumber manufacturer whose plant is situated in the County of Mendocino, State of California. These men had been so employed for a number of years including the calendar years 1959 and 1960. On May 24, 1961 they filed a complaint for wages against petitioner herein.[1] This was to recover *overtime compensation*, together with statutory penalties and attorney's fees, for work performed in 1959 and 1960. The complaint is in the form

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[1] (and against two codefendants who did not perfect an appeal from the judgment and with whom we are not here concerned).

of three separate and similar causes of action, one for each of the three. (C.T. pp. 4-13.)[2]

Each of the counts alleges that defendant therein was a corporation subject to the laws of the State of California and to the provisions of the Fair Labor Standards Act enacted by the United States Congress. (C.T. p. 4, p. 6, p. 8.) The counts are almost identical except as to hours and amounts. That of Mulder, e.g., (C.T. 4-6), alleges that from the 1st of September 1959 to the 1st of August 1960 he was an employee of defendant corporation working as a truck driver; during that period he worked 1325 hours in excess of 40 hours per week; that he had 1325 hours overtime, as to which he was entitled to time and a half, whereas he had been paid only straight time. That his wages were 2.37 per hour; that he had demanded payment of the overtime but defendant had failed, refused and neglected to pay it—that he was damaged in the sum of $2500—that it became necessary to employ an attorney to prosecute the action and that the sum of $500 was a reasonable amount to allow for that purpose; and that the alleged failure by the employer was a violation of law and that the employer was "therefore liable to said employee in an additional amount to the unpaid wages as liquidated damages." Prayer for such relief follows.

The Riddle count (C.T. pp. 6-7) and the Woodall count (C.T. pp. 8-9) were in almost the exact phraseology—only the dates and amounts differing.

[2]There was a fourth cause of action upon which judgment was reversed by the District Court of Appeal and it will not be discussed here.

Defendant corporation (petitioner here) filed its answer (C.T. pp. 13-31) and a supplement to the answer (C.T. pp. 32-33). By its answer—separately to each count—defendant admitted that it was subject to the provisions of the Fair Labor Standards Act—admitted that plaintiffs, respectively, were employed as "truck driver and operator in the usual course of its business, which business included operating as a 'private carrier of property by motor vehicle' within the meaning of the Motor Carrier Act of 1935 as Amended"; that plaintiffs added nothing to the value of the goods, commodities, or articles that were hauled, that the action and proceeding was not of a nature to qualify for the payment of attorney's fees and costs as provided in 29 U.S.C., Sec. 216. (C.T. 14, 19, 24, respectively.) Except as above indicated defendant denied each of the allegations in the complaint.

As an affirmative Answer (and again the allegations respecting Mulder are exactly illustrative of those respecting Riddle and Woodall) defendant alleged (C.T. p. 15) that it was "engaged in the purchase and harvesting of timber, the manufacturing of lumber and wood products, and in the sale of lumber and wood products throughout the United States of America". And that "in the course of its business tenure, defendant operated a lumber and wood products manufacturing facility on Ridgewood Ranch in Mendocino County, California." Further alleging: "That defendant herein was, at all times material to this action, a carrier whose transportation by motor vehicle was, throughout the tenure of defendant's operations, sub-

ject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act of 1935." The affirmative answer further alleged "that throughout all times herein referred to the employees of said class in which plaintiff, Albert E. Mulder, was employed were employees with respect to whom the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service pursuant to the provisions of sec. 204 of the Motor Carrier Act, 1935, and that such power was not limited to the provisions of sec. 204(a) (3a) of said Act". Further alleging (C.T. p. 5) "That the employees within said class were engaged in the operation of a motor vehicle for and behalf of the defendant as a private carrier of property by motor vehicle within the meaning of the Motor Carrier Act, 1935, as amended (29 U.S.C., sec. 201 et seq.). That employees within said class did operate and drive said motor vehicles upon and over public highways and in interstate commerce within the meaning of the Motor Carrier Act aforesaid." The affirmative Answer contained further allegations (C.T. pp. 16-18) respecting the activities of the employees of said class, that they personally drove and operated the motor vehicles to which they were assigned—that they were required in the regular course of their employment to "haul lumber and wood products over public highways from defendant's limber and wood products manufacturing facilities to warehouses, lumber yards, or depots, which lumber and/or wood products were thereafter shipped into and through States of the United States

other than the State of California without any further processing or manufacturing being done upon or with respect to the lumber or wood products hauled"; it further alleged pick-ups and deliveries of items other than lumber in the regular course of their employment as truck drivers and, alleged further (C.T. p. 18) that they were "specifically exempted from the maximum hours and overtime provisions of the Fair Labor Standards Act by the terms and provisions of sec. 13(b)(1) of said Act (29 U.S.C., section 213(b)(1)) as during all of such period of time said Interstate Commerce Commission had the power to establish, for such class of employees, qualification and maximum hours of service, pursuant to the provisions of sec. 204 of the Motor Carrier Act, 1935, as amended." Similar allegations were made as to each of the plaintiffs therein.

The action was tried upon the issues raised by these pleadings. The evidence, objections and arguments as shown throughout the reporter's transcript, and the oral argument of counsel for plaintiffs (R.T. pp. 269 to 279) so disclose. The memorandum opinion of the trial court (C.T. pp. 34(a) to 34(g)) wherein reference is also made to the Portal to Portal Pay Act of 1947, likewise so established. This memorandum opinion is printed in full in Appendix A hereto, *infra*, page 1.

As stated, the memorandum opinion of the trial judge of the Superior Court discloses the various federal questions which were discussed in that court. (C.T. 34(a) to 34(g).) Findings of Fact and Con-

clusions of Law (C.T. pp. 35-38) and Judgment (C.T. pp. 39-41) were signed and filed. The total awards by the judgment (in addition to their regular pay long since collected) were, respectively: Respondent Mulder, $4,441.80; Respondent Woodall, $4,480.00; and, Respondent Riddle, $4,282.46, *plus* $500 attorney's fee allowed to each. (C.T. pp. 39-40.) Motion for a new trial, upon which one of the questions presented herein by petitioner was the omission from the findings of fact of either specific periods of employment, or specific numbers of hours worked, was denied. (C.T. pp. 41a-45.) (A modification was made as to interest, which does not affect this petition.) Thereafter a timely Notice of Appeal was filed to the District Court of Appeal of the State of California, First Appellate District and regularly assigned to Division Two thereof. Appellant's opening brief, respondents' reply brief, appellant's closing brief, were filed, the case was orally argued and submitted, decided adversely to petitioner herein (except as to one factor which does not affect this proceeding). Thereafter a petition for rehearing in said Court was filed and denied. This was the last Court which had jurisdiction of the appeal.[3] A petition for hearing was filed in the Supreme Court of the State of California and denied. That was the final step possible except the instant petition. The petition for rehearing and the petition for hearing are each before this Court as a part of the duly certified transcript of the record.

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[3]Topic "Jurisdiction" supra, page 3. Constitution of the State of California, Sections 4, 4a, 4b.

Mendo Wood Products, Inc. was a California corporation which manufactured lumber at a mill on the Ridgewood Ranch, near Ukiah, California and near California State Highway Number 1. It manufactured only "studs" (2 x 4's of various lengths) and sold them through wholesale lumber brokers. It had been engaged in that business for some years prior to 1959. It used leased trucks for transporting a substantial quantity of studs to designations indicated by its brokers. Some of these deliveries were made by trucks to points within the State of California, some of them were made by truck without the State of California, some of them were delivered by truck directly from the mill to the Ridgewood Station of the Northwestern Pacific Railroad Company, for continuous transportation to out of state points. In these operations it had for several years employed various truck drivers, three of whom were the plaintiffs who brought this action in the Superior Court. During the calendar years 1957 and 1958 all three of these methods of shipment were frequently used.

With no announced change in methods of operations petitioner after January 1, 1959 made no direct truck shipments to out of state points. It did, however, continue to ship lumber directly to out of state points by delivering it to the railroad station just referred to. One of the points in controversy here arises out of the fact that the railroad station was located upon the same real property as was located the mill. When *low* loads were transported the trucks operated through a tunnel under the railroad tracks and did not touch

the public highway in making delivery to the railroad station. Upon *high* truck loads there was evidence that on occasion during the years 1959 and 1960 loads of studs enroute to the railroad station were hauled over California State Highway Number 1—although these specific plaintiffs testified that they had never used State Highway Number 1.

The findings of fact here *did not resolve a controversy* between the testimony of the three plaintiffs and that of Elwood C. Welch, a corporate official (in which case it might be contended that the finding by the trial court could not be attacked). On the contrary testimony of Mr. Welch as to hauling over California State Highway Number 1 (R.T. 214-216) consisted of additional, further, and undenied testimony and there thus arose no conflict. That this is true also appears from the memorandum opinion of the Superior Court (C.T. p. 34(b)) where the Court says: "It was conceded that some trucks may from time to time have used a portion of U. S. Highway 101, but that this was a negligible part of the trip, and that most of the trucks did not use this route. There is no testimony to contradict the plaintiffs' claim that they did not traverse U. S. Highway 101 in making deliveries to the railroad."

The testimony shows without dispute that during the years 1959 and 1960 petitioner shipped large quantities of studs to various wholesale lumber brokers within the State of California, and that a considerable percentage thereof were trans-shipped without the State of California without re-manufacturing

or change of any kind, and in their original form. The correctness of this statement appears from the depositions of William Sharp (Def. Ex. F) and of Robert Hill (Def. Ex. G). Both of these exhibits have come forward with the records of the case.

The studs which were transported from the mill to the railroad station were there loaded on flat cars and consigned to destinations in Georgia, Texas and Arizona, respectively. Each week during the term of time involved in this action (the calendar years 1959 and 1960) approximately two railroad cars were so loaded each week—each car carrying more than 30,000 board feet of studs. Petitioner operated the trucks, had complete control of the trucks, and employed and compensated the truck drivers. (R.T. 215:1 to 216:23.) This action represented no claims made by any of the three plaintiffs for periods worked prior to January 1, 1959—during which period direct truck shipments were admittedly made outside the State of California.

One further type of shipment from *without* the State during 1959 and 1960 is established by the testimony of the witness of E. D. Thompson. (R.T. p. 144, et seq.) As appears by this testimony a substantial quantity of feed mill component parts was carried by the trucks of petitioner herein from the Miller Manufacturing Company in Turlock, California, to the Ridgewood Ranch. Also, that many of these component parts were ordered by Mr. Thompson, Manager of the Miller Manufacturing Company, directly from eastern suppliers from other states for use upon the Ridgewood Ranch, and that such parts were shipped

initially from the points of origin, respectively, outside the State of California, to Turlock. There the parts remained, in their original form, and were transported to the Ridgewood Ranch during the calendar years 1959 and 1960.

Mr. Welch testified as a corporate officer of petitioner that petitioner had no change in corporate policy in 1959 and 1960; that it sought only to sell its products in the market without regard to limitations either interstate or intrastate, that the corporation executives believed they were continuing to perform transportation service in the flow of interstate commerce during these two years and that it was not subject to the wage provisions of the Fair Labor Standards Act. (R.T. 221-223.) During these two years all truck drivers, including these three respondents, were paid in full at the straight time rate, including paid holidays and paid vacations. Time records were maintained in the form of time cards and number of hours to be paid to the drivers for each trip was written on the time card when the driver returned from the trip. Petitioner paid its truck driver employees every two weeks and the drivers were compensated upon the basis of total hours worked during that period, plus holidays.

Plaintiff Mulder testified as to the method used by *all* of the plaintiffs in computing overtime—a method subsequently approved and allowed by the trial court.

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[4]All of these timecards are evidence, and have come forward with this petition. Those of Mulder are Pls. Ex. 5, those of Woodall are Pls. Ex. 3, those of Riddle are Defs. Ex. A.

(C.T. p. 51, l. 17, to p. 58, l. 17.) In substance, he stated that he took the timecards for all of 1959 and 1960, totaled the hours from the first through the fifteenth, from the 16th to the end of the month. If the entries were within 14 days, he then subtracted 80 hours and treated the remainder as overtime. If the entries were over a 15 day period he then subtracted 88 hours and treated the remainder as overtime. No consideration was given to calendar weeks or basic workweeks. He included paid holidays in his computations of time worked. If he was paid for a holiday during a 15 day period, he included the 8 hours for purposes for determining the number of hours worked. The result would be that, in these computations, overtime was claimed for considerable periods of time not worked. (C.T. p. 54, ls. 4 to 23.) The same was true as to the other two plaintiffs. Petitioner has presented the Mulder testimony as illustrative of that of the others.[5]

Thus petitioner was severely prejudiced by the Court's failure to find the number of hours worked by each plaintiff in excess of 40 each workweek. In their computation of overtime hours each plaintiff claimed 8 hours for each paid holiday they enjoyed in 1959 and 1960. These are hours for which they were paid but which they did not work. This is substantiated by the evidence now before this Court.

Each plaintiff computed his claimed overtime hours on a summary sheet from his time cards. (Mulder, Pls.

[5] Count 4, claims of plaintiff Riddle for breakdown time, and allowance of interest, were disposed of in the lower courts and do not concern this petition.

Exs. 5 and 6; Riddle, Defs. Ex. A and Pls. Ex. 7; Woodall, Pls. Exs. 3 and 4.) A consideration of the pay period, January 1, 1959 to January 15, 1959 clearly demonstrates this error. Mulder's time card (Pls. Ex. 5) for this period credits him with 123¼ paid hours. This figure includes eight hours attributed to January 1, 1959 and is clearly marked "holiday." Hence, in fact, Mulder actually worked only 115¼ hours for the period January 1, 1959 to January 15, 1959.

In his computation (Pls. Ex. 6) Mulder claimed 123¼ hours as total hours worked for this period. From this he subtracted 88 hours as straight time and listed the remainder (35¼) hours as the number of overtime hours worked by him in this period. He multiplied this figure by $1.18½ cents (one-half his regular rate of compensation) and claimed $41.77 as unpaid and due overtime compensation. The money judgment in this case is simply an adoption by the Court of these computations by plaintiffs.

Hence, Mulder received $18.96 (8 hours times $2.37) from petitioner to take a day off; was also awarded $9.48 (8 times $1.18½) as overtime pay for this same holiday; and was also awarded an additional $9.48 as a penalty imposed upon petitioner for its "willfull" failure to pay him time and one-half for these holiday hours. Defendant's Exhibit C demonstrates that the three plaintiffs *claimed and were awarded overtime compensation, plus penalties for at least 152 hours—holiday hours—which they did not work.*

During the years 1959 to 1960 none of the plaintiffs at any time made a claim for compensation for overtime (R.T. 58, lines 14-17) or any other form of penalty, and plaintiffs and defendant in the California action at all times conducted themselves as believing that the truck drivers employed by petitioner were not subject to the wage provisions of the Fair Labor Standards Act. Many of the foregoing statements fall in the category of "Facts Admitted" and are set forth in appellant's opening brief, pages 9-10, without challenge.

Appellant believes that the foregoing recites and encompasses those facts necessary to enable this Court to have before it the acutal and complete factual picture necessary to the determination of this petition. Appellant does not believe that any briefer statement would have sufficiently served that purpose. It is earnestly and respectfully hoped that the petition for the writ will be granted and petitioner thereby enabled to more adequately, completely, and forcibly present both the facts and the legal issues involved.

REASONS FOR GRANTING THIS WRIT

PRELIMINARY STATEMENT

Petitioner has set forth above three separately numbered "Questions Presented". However, they really fall into a single category and petitioner believes that its argument can be presented more briefly and more effectively by discussing the three under the same

treatment. Petitioner has meticulously endeavored to place before this Court, by way of this petition, by way of Exhibits A and B hereto attached, and by the dispatch of the complete certified transcript of the record, *including* all original exhibits in evidence in the trial court, everything which would reflect the cause below. It has also, under the heading "Statement of the Case", been equally meticulous in supplying this Court with a full and accurate record of proceedings had and of testimony given, insofar as it affects this petition. If petitioner has erred in the detail and length thereof, it has done so solely in the effort to aid this Court by presenting the true "picture" of this case, from the date the complaint was filed in the Superior Court in California until a hearing thereof was denied by the Supreme Court of the State of California, albeit as briefly as reasonably possible.

In essence, the single question propounded to this Court is one which petitioner believes to be of tremendous importance, both to it for the financial reasons disclosed by the record herein (in large sums for penalties and attorney's fees), and for a wider and larger reason to those classes of people (into which actually fall not only petitioner, itself, but the individual plaintiffs as well) about whom the Congress has seen fit to throw protective laws, e.g., The Fair Labor Standards Act and its two companion acts referred to in the footnotes to each of the preceding "Questions Presented" were enacted to protect the people of the United States, *all* the people, and that protection includes, of course (authorities *infra*) pro-

tection from a State government—whether it be executive, judicial or legislative.

Mooney v. Holohan, 294 U.S. 103;
36 C.J.S., Federal Courts, Sec. 28, p. 150;
11 Cal. Jur., 2d, Constitutional Law, Sec. 395, p. 774.

These three acts were and are intended to ensure to employees certain rights and privileges. But that was not their sole purpose, they were and are intended also to protect the *employers*. In the case here brought before this Court the right of the employees (plaintiffs therein—respondents herein) was (barring exemptions to the employer, petitioner herein) to receive time and one-half for more than 40 hours work performed in one week, and if not so paid, they were entitled to have a judgment for the one-half unpaid, for an additional equal amount as liquidated damages, and for attorney's fees. (Section 216(b) of the Fair Labor Standards Act, Apdx. B, *infra*, page 38.) This protection for the *employees* (plaintiffs in this case) was received in the State courts. However, these same statutes afforded the right to the employer (petitioner herein) to be exempted from payment of the one-half overtime compensation, with its penalties and attorney's fees, in certain events—including the operation of a trucking business by a "Private carrier of property by motor vehicle . . . in interstate . . . commerce . . . in furtherance of any commercial enterprise." (Sec. 303, Motor Carrier Act of 1947, Apdx. B, *infra*, page 39.) This right was a concomitant of the other: hence where the employees have been

awarded extra compensation, liquidated damages, and attorney's fees, for services performed while the employer was so engaged in interstate commerce as a private carrier, they were *not* entitled thereto. Thus, simple academic justice joins with legal and constitutional requirement in the relief here sought.

What was it that determined in the State courts that this award should be made in favor of the employees and against the employer? Evidence, which the Court believed, that defendant was not so engaged during the time covered (1959-1960). The Court also awarded such payments for services rendered from January 1, 1959 to May 24, 1959, all for services performed more than two years prior to the commencement of the action, payment of which is inhibited by Section 255 of the Portal to Portal Pay Act of 1947. (Apdx. B, hereto, *infra;* p. 40.) This, to defendant's severe financial loss.

And how did the state court accomplish these things of which petitioner complained vainly to the appellate courts of the State of California, including its Supreme Court? By omitting from its Finding of Fact (even after its errors were pointed out fully and accurately by petitioner herein upon motion for new trial (C.T. 42-45) and its various steps on appeal, *supra,* page 11), matters which, first would sustain the position of defendant, and second, were in violation of the mandatory statutes and of the decisions of the State of California. Petitioner's position is that simple. But the fact remains that it is heavily aggrieved, and that it is saddled with a judgment for a

large sum of money, with heavy preparation and litigation expenses and costs, all because of what it believes to be, and believes it can here establish: *the erroneous denial to it of the protection of these federal statutes.*

All applicable constitutional provisions and legislative enactments and regulations, in pertinent part, are appended hereto as Exhibit B. Section 8, Clause 3 of the Constitution of the United States because under that clause this protective legislation was enacted; Amendment XIV to the Constitution of the United States for the reason that it must appear herefrom that petitioner has been deprived of its property without due process of law; Title 28 U.S.C., Section 1257, subd. 3, for the establishment of the right to petition this Court for the writ of certiorari here sought; the Fair Labor Standards Act, Motor Carrier Act of 1935, and the Portal to Portal Pay Act of 1947, for the reason that these are the enactments by the Congress which establish the rights sought to be enforced in this litigation—not only by the employees, but by the employer; Federal Regulations Title 29, for the reason that they contain the interpretation of the Department of Labor respecting the workweek overtime compensation here involved, which sustain petitioner's contentions, and which were appropriately called to the attention of both the trial and appellate courts during the progress of the case.

The Judgment of the State Court rests upon Findings of Fact which (1) omit a finding of any change in or termination of the admitted status of petitioner as a private motor carrier operator exempt from the Fair Labor Standards Act during 1957-1958, (2) omits a finding that the status of petitioner as an exempt private motor carrier under the Fair Labor Standards Act terminated upon January 1, 1959—with the record entirely silent as to any action, proceeding or notice of such termination; (3) omits a findings as to the number of actual hours worked and paid for (that being the essential basis for the penalties imposed by the Act and the Judgment).

As we have seen in the first portion of the Statement of the Case, the findings of fact and conclusions of law of the trial court are very brief (three double spaced transcript pages) and contain *no slightest reference* to any item or condition of employment or transaction prior to January 1, 1959. (C.T. 35-38.) The judgment, even briefer, contains a page and a half (C.T. 39-40) and is even less specific—mentioning only money and no date prior to June 1, 1961.

This situation of the record means merely that a 13-page four-count complaint (C.T. 4-13) and a 20-page both denial and affirmative answer (C.T. 13-33) have, by a trial before the Court without a jury been finally resolved to findings and judgment of the meagre length and content just indicated. So meagre in fact, that petitioner is encouraged in its contemplation that this Court will conclude a most important issue is involved and for such reason grant the writ herein applied for.

There were numerous other contentions made in the courts below but petitioner has deliberately seen fit to

"concentrate its fire" upon these here presented. It confidently trusts that it has made no mistake in that regard.

The situation we have, basically, is the interpretation by the California courts of its own law and of the federal statutes hereinbefore mentioned (and described, in pertinent form, in Appendix B hereto). An action appropriately tried under the California law and federal law, but improperly decided. And, as in all such cases, where the State court has by its actions nullified for a litigant the rights, privileges, and protection afforded and guaranteed to such litigant, by the federal constitution and by federal statutes which have, in turn, been enacted pursuant to constitutional authority. This, as we have also seen hereinabove. In other words, the State court may try the issues raised by the parties hereto, and may—in fact, must—apply the California rules of law thereto. In so doing, however, the State courts may not evade or ignore the rights accorded to the litigants by federal laws. Or, as we here assert, disregard or disobey or fail to observe the laws of the State of California in such manner as to effect the deprivation to the litigants of such federal rights. It is to this extremely important point or question, exactly exemplified by the proceedings in the State court in the instant case, that petitioner earnestly, conscientiously and vigorously directs the attention of this Court.

With respect to required findings of fact and conclusions of law, Section 632 of the Code of Civil Procedure of the State of California reads, insofar as here applicable, as follows:

> "In Superior Courts and municipal courts, upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated. The statement of facts found shall fairly disclose the court's determination of all issues of fact in the case. * * * judgment upon the decision must be entered accordingly. * * *"

This section has been in effect in California since the enactment of its codes in 1872. It has been amended four times since then. None of the changes would affect the situation here presented. The last amendment, in 1959, was the addition of the third sentence quoted above viz., "The statement of facts found shall fairly disclose the court's determination of all issues of fact in the case." Due to its importance, this section has been construed many, many times by the courts of California as is evidenced by the annotations to the West and to the Deering annotated publications of the California Code of Civil Procedure.

In the brief space accorded for a petition of this character—directed solely to securing the issuance of the writ—it is not possible to review these decisons. However, the subject matter is carefully treated in 48 California Jurisprudence, 2d, under the heading of "Trial". This volume bears the publication imprint of 1959 and there is appended thereto a 1964 Pocket Cumulative Supplement. Petitioner respectfully directs the Court's attention to the fact that the topic

of findings of fact and conclusions of law is there discussed in sections 279 to 318, and will here quote from the text very briefly. The supporting notes (numbers carried here for convenience) have been examined and petitioner believes they are confirmatory of the text.

Section 294 *Scope of Findings* (p. 294):

> "It is essential that, unless they are waived, findings be made on every material issue raised by the pleadings[16] and the evidence,[17] whether those issues are raised by denial of the allegations of the complaint[18] or cross-complaint,[19] or on affirmative defenses set up in the answer[20] or cross-complaint.[1] * * * *
>
> Although failure to find on a material issue is reversible error,[5] at least if the omitted findings may have the effect of controverting or destroying the effect of other findings,[6] specific findings on each of several material issues are not necessary, where taken as a whole or construed together the findings clearly show that they include the material issues.[7] * * *"

And see *O'Brien v. O'Brien,* 124 Cal. 422, and *Bird v. Murphy,* 72 C.A. 39.

From Section 300, *Definiteness and Certainty* (p. 300):

> "The findings should be framed with sufficient definiteness, certainty and clarity to indicate what it intended,[1] or what theory it adopted.[2] The party against whom they are made must be able to specify any particulars in which they are not supported by the evidence.[3] Where they are not sufficiently definite and intelligible to dispose of the

> material issues without resort to speculation and conjecture, a judgment based thereon will be reversed.'"

And see *J. J. Howell and Associates, Inc. v. Antonini,* 124 C.A.2d 388, and *Hicks v. Barnes,* 109 C.A. 2d 859.

Nowhere in the record of the instant case is there an indication of any requirement that the motor vehicles of an exempt motor carrier in interstate commerce need have an operating permit, or carry special registration plates, or *any* special requirement except such as may be imposed by the Interstate Commerce Commission. Nor was there any showing that such plates or any other suggested items were carried in 1957 to 1958, when it is admitted that petitioner was so operating. There was no question of any kind nor any legal objections of any kind interposed anywhere during the proceedings respecting petitioner's operations prior to January 1, 1959.

It has been repeatedly held that in order to be engaged in interstate commerce it is not necessary that the employer's equipment actually *cross state lines,* but it is only necessary that the property transported in the trucks *be in interstate shipment.*

> *Beggs v. Kroger Company,* 167 F. 2d 709 (Arkansas, 8th Cir.);
>
> *Fletcher v. Grinnell Bros.,* 78 F. Supp. 339 (D.C., Mich., S.D.).

These authorities establish, as a matter of law, that the trucking operations conducted by petitioner dur-

ing 1959-1960 were in interstate commerce. (We find no case which holds that change of title in the property composing the shipment alters the interstate nature of the commerce.)

As we have seen, there is no conflict in the evidence here which could sustain the findings and judgment of the trial court by reason of a State rule of law. The three plaintiffs testified only that *they* did not operate trucks upon the public highway. The testimony of Mr. Welch, secretary of the petitioner corporation *does not create a conflict*—his testimony (R.T. 215:1 to 216:23) was that many trips were made during 1959-1960 from the mill over the public highway (California State Highway No. 1) to the railroad station. There was no contra. Thus we have a situation which the trial court should not have, and could not have ignored—but did. *Florida v. U.S.*, 282 U.S. 194, involved a United States District Court and an order of the Interstate Commerce Commission—rather than State law in a State court. We, nevertheless, have the views of this Court—upon the question of findings expressed in the language of Mr. Chief Justice Hughes. Therein a proposal had been submitted to the Commission for a revision of interstate rates. The Commission made a tabular comparison of other rates, concluded that the interstate rates thus proposed were reasonable, and made certain findings (p. 206). In its discussion of the circumstances of that case the opinion says, page 212:

> ". . . it must appear that there are findings, supported by evidence, of the essential facts as to the

particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which justified that conclusion."

The opinion continues to discuss the absence of findings upon various essential points, and strongly presents confirmation of the rule petitioner believes should be applied in the instant case (page 215):

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, * * * but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

Of like purport was *Webster-Brinkley Co. v. Belfield*, 166 F.2d 814 (C.A. 9th Cir.) where the Fair Labor Standards Act was interpreted in the light of the necessity for findings.

Thus this Court has spoken respecting the *necessity* of *essential* findings—and the holding therein is no less appropriate to the State case which is here brought before this same Court for review. That this is true is established by numerous decisions of this Court. The classic language of Mr. Justice Holmes

in *Davis v. Wechsler*, 263 U.S. 22, at p. 24, expresses it well:

> "If the Constitution and laws of the United states are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

And:

Ogama v. California, 332 U.S. 633.

The decisions are clear that is is not necessary for the Interstate Commerce Commission under the Motor Carrier Act of 1935 to *actually establish* the "reasonable requirements" etc. in that Act provided. In the language of *Morris v. McComb*, 332 U.S. 422, which comments upon and expressly carries along the rules laid down in the cases of *Levinson v. Spector Motor Service*, 330 U.S. 649, and *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, it is said, at page 431, that it is:

> ". . . the character of the activities rather than the proportion of either the employee's time, or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment."

And at page 434 the opinion further states:

> "We hold that the Commission has the *power* to establish qualifications and maximum hours of service, pursuant to the provisions of Section 204

> of the Motor Carrier Act, for the entire classification of petitioner's, drivers and 'mechanics' and it is the existence of that power (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not Section 7 of the Fair Labor Standards Act is applicable to these employees. Congress has gone out of its way to make this purpose clear in cases comparable to the one before us." (Emphasis by the Court.)

To the same effect is *Southland Gasoline Co. v. Bayley*, 319 U.S. 44.

These same cases are also authority that (p. 423 of the *Morris* case) 3 to 4 per cent of the total carrier services, distributed generally through the year, is sufficient to empower the Commission, although not holding that *any* specific proportion is required. This opinion reviews prior cases—and contains other illustrations.

At this point petitioner would like to present to this Court a point raised in Question Presented, No. 2, *supra*, and in the subheading to this treatment. Petitioner presented this contention in nearly identical language to the California Supreme Court at pages 12, 13 and 14 of its Petition for Hearing (which has come forward, not as a brief, but as a part of the transcript of the record).

It was shown in the Statement of Facts in the Court below, and in the Statement of the Case herein, *supra*, that petitioner had been engaged since 1955 in the hauling of lumber en route to Eastern points. During

the entire period down to 1960, inclusive, both plaintiffs below and petitioner believed the operations were, *as they admittedly had been prior to January 1, 1959,* in interstate commerce, and so exempt from the provisions of the Fair Labor Standards Act. *After* 1960, plaintiffs below brought this action and sought to prove that during 1959 and 1960 such exempt status no longer obtained. To such contention is addressed this argument.

Why a change in its status? It was making the shipments referred to in the Statement of the Case—it was ready at any time to make out of state shipments by trucks—if the orders came in. There was no point of stoppage of its status. We have been able to find no case which says how—or when—such a right is lost. Petitioner is not a common carrier, with published tariffs—but, like all other such motor carriers, enjoys quite an informal status—determined by the nature of its activities.

Petitioner submits that the facts set forth above and the law discussed in this petition should settle the controversy—and *do* settle it. Whatever rights petitioner formerly had as a private motor carrier *it still has.* It has never lost them—no one has ever taken them away—no official body has ever notified it that it has lost its rights. Just when was there a termination? We have found no criterion—but it must be a long, long time. Would anyone stop petitioner if it shipped a truckload of "studs" to the East coast tomorrow morning? Or while plaintiffs were still working for it? And if its rights had not been terminated it still has them, and as a consequence,

during 1959 and 1960 plaintiffs were exempt from the coverage of the Fair Labor Standards Act—just as they had been in 1958 and prior years. Hence they were not entitled to recover any of the amounts claimed.

Would an out of state delivery on January 1, 1958 have been without the operation of the exemption? Or one on July 1, 1958? When, then, did the exemption expire—and are we not entitled to *know* when? If petitioner had shipped out *one load* in December, 1959 would it have been "reinstated"? If so, from what source?

When and how has the Interstate Commerce Commission revoked the right to enjoy this privilege? Is there any formal proceedings required? Was there any such proceeding? Was there *any* proceeding? Does not the consideration of these numerous inquiries compel the conclusion that a finding of such termination was absolutely essential to sustain a judgment in this case? Only the Commission (which has not acted, and does not ordinarily act in such situations) or the trial court in this case could determine the situation. And if the trial court is to deprive petitioner of its admitted rights under the federal act then it must *necessarily* make a finding to that effect. *We have no finding!*

What were the findings of fact in this case, or, perhaps, what were *not* the findings of fact in this case?

There were no findings as to the specific periods of employment of any of the plaintiffs, the periods for which time and one half was to be paid, or the number

of hours at which the one and one half times basic rate was required by the law. There was a finding that plaintiffs worked various times in excess of 40 hours per week and there was a finding that the plaintiffs each received a rate of pay of $2.37 per hour or more. No finding was made as to the specific rates of pay upon which the overtime awards were computed or made. And there are no findings of fact on appellant's *affirmative* defense that plaintiffs were exempt from the overtime provisions of the Fair Labor Standards Act. There are no findings of fact as to the number of hours worked by each plaintiff in excess of 40 hours per week.

Actually, evidence consisting of the plaintiff's original time cards (which have come forward in the record to this Court) contradict the trial court's findings of fact as to the amount due each plaintiff for overtime. This has been heretofore set forth.

In computing the overtime hours for which plaintiffs based their claim plaintiffs did not take a single work week as a standard. Instead, they averaged hours over a semi-monthly period. (RT 52:6-16.) It is quite patently contrary to the definition of overtime set forth in the Act itself—and it was so held in *Black v. Roland Electrical Co.*, 68 F. Supp. 117 (D.C., D. Maryland).

Whether or not plaintiffs were exempt from the Fair Labor Standards Act is, of course, a question of law. Plaintiffs must have proven the number of hours worked in excess of 40 in *any given work week*. This figure must then be multiplied by one half the rate of regular compensation applicable to any workweek

in which hours in excess of 40 were worked. It is a right created by statute. It is, therefore, the legal duty of plaintiffs to clearly establish each element of the right to recover and this has not been done. *Nor do the findings of fact so state.* When records are adequate under the Fair Labor Standards Act (and they were in this case, and have come forward as a part of the record) findings cannot be based—as were the findings here—upon estimates, guesswork, or "plaintiffs' computations."

Anderson v. Mt. Clements Pottery Co., 328 U.S. 680;

Gorchakoff v. Calif. Shipbuilding Corp., 63 F. Supp. 309.

The trial court failed and refused to make findings on the specific number of hours worked by each plaintiff in excess of 40 in each workweek for which unpaid overtime compensation is claimed—it failed to find the regular rate of compensation applicable to each workweek for which unpaid overtime compensation is claimed. The District Court of Appeal opinion ignored the omission of such findings—*indispensable to the judgment.*

May such a device frustrate an employer in the protection of his rights under federal statutes? *Stardivant v. Salt River Valley Water Users Assn.* (C.A., 9th Cir.) 249 F.2d 944, was an action commenced under the Fair Labor Standards Act and an appeal which the Court said carried "a whole attack upon the findings and conclusions of the trial court". The findings in this case were somewhat comparable to those in the instant case. The Court said (p. 950)

there should be a specific finding in that: "this should set out the actual hours worked and the pay received and the pay found due." To petitioner this seems a clear and fair statement of a rule of law which could hardly be otherwise. The Court remanded the case for specific findings or a new trial.

These are the computations on which the trial court based the judgment—in its findings of fact the court merely adopted plaintiff's figures as the amount of the unpaid wages due each item. (CT 36:6-10.) As we have seen, they are clearly erroneous and contrary to the law. The District Court of Appeal ignored them, but, involving a federal right as they do, petitioner hopes for relief in this Court.

The opinion of the District Court of Appeal completely omits reference to *holidays*—a very vital matter in the failure of the findings. The opinion likewise attempts to support its holding by relying upon *Dallum v. Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785. (Apdx. A, p. 22.) This was merely a District Court opinion (Minnesota). It is the only authority so cited and petitioner respectfully asserts that the District Court there held that the essential character of the commerce determined whether the plaintiffs were engaged in transportation of goods in interstate commerce. It does not support the opinion we here attack.

The District Court of Appeal opinion refers to the shipment of feed mill parts (R.T. 144, et seq.—also statement of the case, *supra*) as merely an "isolated incident". (Apdx. A, p. 23.) Actually, it was one of

many—including the direct shipment from the mill over the *public highway* in California to the railroad station and thence to Georgia, Texas and Arizona, discussed hereinabove.

The opinion held that the finding of the total amount of overtime paid to each respondent was a "statement of ultimate fact"—citing in support thereof *Nisbet v. Rhinehart*, 2 Cal.2d 477, 482. (Apdx. A, p. 30.) Again, that Court was in error, for the *Nisbet* case *is strictly limited by its terms* to that type of action in which a finding of indebtedness is a proper statement of ultimate fact. The *Nisbet* case recognizes only one exception to the rule that a general finding of indebtedness is a conclusion of law. That exception is the case of the "common count". Petitioner respectfully submits that the *Nisbet* case does not support the District Court of Appeal that the holding of the amount of overtime pay due is a proper statement of ultimate fact. The net result, to be slightly repetitious, was to deprive petitioner of its rights under the federal statutes.

The correct California rule is set forth in the very highly respected work of B. E. Witkin on *California Procedure*, Vol. 2, Trial, sec. 113, at page 1844, and in the 1963 Permanent Supplement thereto (page 569) is found this language:

> "*Indebtedness.* In an action for accounting, a general finding of indebtedness is insufficient if the appellate court cannot discover from the record the manner in which the account was calculated and the items which entered into it. (Shenson v. Shenson (1954) 124 C.A. 2d 747, 754, 269 P. 2d 170.)"

The *Shenson* case involved an accounting which failed to show the court's computation.

The evidence, the findings and the conclusions demonstrate that the judgment was rendered without the slightest consideration of the rights created by the Fair Labor Standards Act. Plaintiffs were awarded monies for unpaid overtime compensation (and penalties, plus attorney's fees) without considering the Act's definition of overtime. These awards actually included compensation for hours plaintiffs did not work—for holidays—even for hours they did not allege in their complaint. And, of course, the total scope of the plaintiffs' activities must be considered as a whole.

The only reasonable contention that could be made to uphold the findings of the trial court—affirmed by the District Court of Appeal—would be reliance upon the finding that defendant (this petitioner) was subject to the Fair Labor Standards Act. However, this is not and cannot be a proper finding of ultimate fact. That such a finding is a mere conclusion of law is evidenced by innumerable authorities, including

Kantar v. Garchell, 150 F. 2d 47 (C.A., 8th Cir.);

Webster-Brinkley Co. v. Belfield, 166 F. 2d 814 (C.A., 9th Cir.).

Petitioner realizes it cannot—even though it would appear that it has already done so—imposed upon this Court all the details—contentions—and authorities—urged before the several state courts. It seeks here only to convince this Court that it was necessary

to have proper findings—that without them petitioner has been wrongfully deprived of rights guaranteed to it by constitutionally tested federal enactments; and that such holding would in the future affect many persons, and that hence the writ should be granted.

CONCLUSION

Surely the State Court here has decided a federal question of substance "in a manner which petitioner believes is probably not in accord with applicable decisions of this court" (Supreme Court Rules, 19(1)(a)); and surely petitioner has now established that such belief was correct. The granting herein of the writ of certiorari applied for would serve two purposes—both of which are desirable—both of which are salutary—both of which are of importance. In importance to the public we have a factor particularly close to the heart of this Court, in that it is of tremendous importance to a very considerable number of people—to all of the people—that a State Court be not permitted to deprive such persons, either real or artificial, of the protection afforded to them by the Constitution of the United States, or by enactments of the Congress which have been declared to be within the provisions of such Constitution, by the very simple expedient of omission or refusal (in the present case *flat refusal*) to sign findings of fact which are required by State, as well as Federal, law, *as an essential basis for the entry of a judgment.*

As petitioner has carefully pointed out—and has tried to do so clearly and distinctly and unmistakably

—brushing to one side other issues which were raised in the lower courts and which it might also present to this Court—all to the end of establishing both facts and law which will, it trusts and believes, impel this Court to issue the writ here prayed for. The other reason, very important to petitioner and doubtless also of interest to this Court—although it fears not determinative upon that ground alone, is the correction of the grave injustice by which petitioner will be mulct of very considerable sums of money to go to the pockets of plaintiffs below, and of their attorneys, for wages, penalties, and fees, none of which were ever in the slightest degree expected or anticipated during the period of employment or until long thereafter.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendix Follows)